

**Rokiah bt Suhaili v Emly Batu ak Bagang & Ors**

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HIGH COURT (KUCHING) — SUIT NO 22–121 OF 2010-I  
RAVINTHRAN JC  
31 DECEMBER 2012

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*Civil Procedure — Pleadings — Fraud — Allegation of — Failure to provide particulars of — Whether claim should be dismissed — Rules of the High Court 1980 O 18 r 12(2)*

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*Contract — Sale and purchase of land — Misrepresentation — Allegation of — Plaintiff entered judgment in default against first and second defendants — Plaintiff proceeded instant action against third and fourth defendants — Whether fraud and misrepresentation established — Whether power of attorney empowered first defendant to sell and transfer land without any limitation — Whether third and fourth defendants bona fide purchasers — Whether fourth defendant purchased land to cover up fraud committed by third defendant — Plaintiff's solicitor drafted sale and purchase agreement and received purchase price — Whether plaintiff could not disavow any knowledge of the transaction — Contracts Act 1950 s 18*

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*Evidence — Burden of proof — Fraud and misrepresentation — Allegation of — Whether sale transaction tainted by fraud — Burden of proving fraud lies on plaintiff — Whether standard of proof for fraud is the criminal standard established — Evidence Act 1950 s 101 — Sarawak Land Code (Cap 81) ss 132, 133 & 134*

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In this action the plaintiff claimed for the return of her land that was sold to the third defendant and subsequently to the fourth defendant. The sale of the land to the third defendant was through a power of attorney that she had executed in favour of the first defendant. It was alleged that the first defendant and the second defendant had committed fraud by selling the land to the third defendant. The plaintiff had already entered judgment in default against the first and second defendants and the instant trial proceeded against the third and fourth defendant only. The plaintiff had pleaded fraud and misrepresentation against Emily Batu and Augustine Ling, the first and second defendants respectively. The particulars of fraud and misrepresentation were that Augustine Ling had misled the plaintiff to believe that the development plan for Lot 451 had been approved and that the plaintiff would be given cash of RM15,000 plus a further consideration of two units of single-storey semi-detached houses and one unit single storey terrace intermediate house for

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A the said land. This was the consideration stated in the development agreement. Furthermore, when the development agreement was revoked by the supplementary agreement, Augustine Ling misrepresented to the plaintiff that she would be getting a detached house on Lot 9786 in exchange for the consideration of RM15,000 plus a further consideration of two units of  
B single-storey semi-detached houses and one unit single storey terrace intermediate house on Lot 451. The plaintiff only found out later that Emily Batu and Augustine Ling had no interest in the residential development project on Lot 9786 and they were in no position to secure the plaintiff a detached house on Lot 9786. Thus, they had fraudulently misrepresented to the plaintiff  
C that she would be given a detached house on Lot 9786 as consideration for releasing Emily Batu from her obligations under the development agreement. The plaintiff had proved fraudulent misrepresentation against Emily Batu and Augustine Ling and accordingly judgment in default had already been entered against them. The crucial question in this case was whether the plaintiff had  
D proved fraud or fraudulent misrepresentation against Serira Sdn Bhd and Rose ak Enteri, the third and fourth defendants respectively.

**Held**, dismissing the plaintiff's claim with costs of RM15,000 to the third  
E defendant and RM7,000 to the fourth defendant:

- (1) Order 18 r 12(2) provides that particulars of fraud or misrepresentation must be given in the pleading. The three paragraphs in the statement of claim directed against the third and fourth defendants were general averments only which are singularly lacking in particulars. No particulars  
F in respect of the involvement of the third and fourth defendants in the fraudulent misrepresentation made by Emily Batu and Augustine Ling to the plaintiff were given. On this ground alone, the claim against the third and fourth defendants should be dismissed (see paras 11 & 13).
- (2) There was no evidence at all that the third defendant had made any representation to the plaintiff or had misled her through Mr Ting, the solicitor who acted for the third defendant, or any other person. The only evidence relating to misrepresentation given by the plaintiff was that an unknown and unidentified person had apparently approached the  
G plaintiff on behalf of the third defendant to seek her permission to dump excess earth on her land. However, no further evidence was tendered in respect of this allegation and it was not clear how this encounter with the unidentified person supports allegation of misrepresentation against the  
H third and fourth defendants (see para 15).
- (3) The power of attorney was valid at the time of the sale of Lot 451 to the  
I third defendant. Furthermore, cl 7 of the power of attorney was wide in its application. It does not provide that the donee could only sell developed subdivided lots. In the premises, it was clear that the first

defendant was empowered by the terms of the power of attorney to sell Lot 451 to the third defendant (see para 20).

- (4) Furthermore, Mr Osman Ibrahim, the solicitor of the plaintiff, drafted the sale and purchase agreement and received the purchase price. For that reason, the plaintiff could not disavow any knowledge of the transaction. For the same reason, the plaintiff could not blame the third defendant for not receiving the purchase price (see para 25).
- (5) The plaintiff's case against the fourth defendant was that the fourth defendant had purchased the land to cover up the fraud committed by the third defendant. However, no evidence whatever against the fourth defendant either for fraud, misrepresentation or conspiracy were tendered in court. In fact the third defendant sold the land to the fourth defendant only after some time, ie about two and a half years after purchasing it. Therefore, it was unlikely that the sale was a sham to cover up the alleged fraudulent purchase of the land. Further, as the plaintiff had failed to prove fraud on the part of the third defendant in the sale and purchase of Lot 451, it follows that the case against the fourth defendant would fail as well (see para 24).

**[Bahasa Malaysia summary]**

Dalam tindakan ini plaintiff menuntut tanahnya yang telah dijual kepada defendan ketiga dan kemudian kepada defendan keempat dikembalikan. Jualan tanah kepada defendan ketiga adalah melalui surat kuasa wakil yang telah dimasuki olehnya menyebelahi defendan pertama. Adalah dikatakan bahawa defendan pertama dan defendan kedua telah melakukan fraud kerana menjual tanah itu kepada defendan ketiga. Plaintiff telahpun memasukkan penghakiman ingkar terhadap defendan-defendan pertama dan kedua dan perbicaraan ini dimulakan terhadap defendan-defendan ketiga dan keempat sahaja. Plaintiff telah mempli fraud dan salah nyata terhadap Emily Batu dan Augustine Ling, defendan-defendan pertama dan kedua masing-masingnya. Butiran fraud dan salah nyata adalah bahawa Augustine Ling telah mengelirukan plaintiff untuk mempercayai bahawa pelan pembangunan untuk Lot 451 telahpun diluluskan dan bahawa plaintiff akan diberikan wang tunai RM15,000 dan balasan selanjutnya dua unit rumah berkembar satu tingkat dan satu unit rumah teres satu tingkat untuk tanah tersebut. Ini adalah balasan dalam perjanjian pembangunan itu. Tambahan pula, apabila perjanjian pembangunan telah dibatalkan oleh perjanjian tambahan, Augustine Ling telah menyalahnyata kepada plaintiff bahawa dia akan mendapat rumah berkembar atas Lot 9786 sebagai balasan untuk RM15,000 dan selanjutnya balasan dua unit rumah berkembar satu tingkat dan satu unit rumah teres satu tingkat atas Lot 451. Plaintiff hanya mendapati kemudian bahawa Emily Batu dan Augustine Ling tidak mempunyai kepentingan dalam projek pembangunan perumahan atas Lot 9786 dan mereka tiada kedudukan untuk menjamin plaintiff rumah berkembar atas Lot 9786 itu. Oleh itu, mereka telah

- A memberi salah nyata secara fraud kepada plaintif bahawa dia akan memberikan rumah berkembar atas Lot 9786 itu sebagai balasan untuk melepaskan Emily Batu daripada tanggungjawabnya di bawah perjanjian pembangunan itu. Plaintif telah membuktikan salah nyata fraud terhadap Emily Batu dan Augustine Ling dan sewajarnya penghakiman ingkar telah dimasukkan
- B terhadap mereka. Persoalan penting dalam kes ini adalah sama ada plaintif telah membuktikan fraud atau salah nyata fraud terhadap Serira Sdn Bhd dan Rose ak Enteri, masing-masing merupakan defendan-defendan ketiga dan keempat.
- C **Diputuskan**, menolak tuntutan plaintif dengan kos sebanyak RM15,000 kepada defendan ketiga dan RM7,000 kepada defendan keempat:
- (1) Aturan 18 k 2(2) memperuntukkan bahawa butiran fraud atau salah nyata hendaklah dikemukakan dalam pliding. Tiga perenggan dalam
- D pernyataan tuntutan ditujukan terhadap defendan-defendan ketiga dan keempat adalah penegasan am sahaja yang tidak mempunyai butiran mencukupi. Tiada butiran berkaitan penglibatan defendan-defendan ketiga dan keempat dalam salah nyata fraud yang dibuat oleh Emily Batu dan Augustine Ling kepada plaintif telah diberikan. Atas alasan ini
- E sahaja, tuntutan terhadap defendan-defendan ketiga dan keempat patut ditolak (lihat perenggan 11 & 13).
- (2) Tiada keterangan langsung bahawa defendan ketiga telah membuat apa-apa representasi kepada plaintif atau mengelirkannya melalui Encik Ting, peguamcara yang bertindak bagi pihak defendan ketiga, atau
- F mana-mana orang lain. Hanya keterangan berkaitan salah nyata telah diberikan oleh plaintif menunjukkan bahawa seseorang yang tidak diketahui dan tidak dikenalpasti dilihat telah berjumpa plaintif bagi pihak defendan ketiga untuk meminta kebenarannya membuang lebihan tanah di atas tanahnya. Walau bagaimanapun, tiada keterangan lain
- G dikemukakan berkaitan pernyataan ini dan ia tidak jelas bagaimana perjumpaan ini dengan orang yang tidak dikenalpasti menyokong pernyataan salah nyata terhadap defendan-defendan ketiga dan keempat (lihat perenggan 15).
- (3) Surat kuasa wakil adalah sah pada masa jualan Lot 451 kepada defendan ketiga. Tambahan pula, klaus 7 kepada surat kuasa wakil adalah luas dalam permohonannya. Ia tidak memperuntukkan bahawa penerima boleh hanya menjual bahagian lot-lot yang dimajukan. Dalam premis ini, adalah jelas bahawa defendan pertama diberi kuasa oleh terma-terma
- I surat kuasa wakil untuk menjual Lot 451 kepada defendan ketiga (lihat perenggan 20).
- (4) Selanjutnya, Encik Osman Ibrahim, peguamcara plaintif, telah mendaftarkan perjanjian jual beli itu dan menerima harga belian. Atas sebab itu, plaintif tidak boleh menafikan dia tiada pengetahuan tentang

transaksi itu. Atas sebab sama, plaintif tidak boleh menyalahkan defendan ketiga kerana tidak menerima harga belian (lihat perenggan 25).

- (5) Kes plaintif terhadap defendan keempat adalah bahawa defendan keempat telah membeli tanah tersebut untuk menutup fraud yang dilakukan oleh defendan ketiga. Walau bagaimanapun, tiada langsung keterangan terhadap defendan keempat sama ada untuk fraud, salah nyata atau konspirasi yang dikemukakan di mahkamah. Bahkan defendan ketiga telah menjual tanah tersebut kepada defendan keempat hanya selepas beberapa lama, iaitu lebih kurang dua setengah tahun selepas membelinya. Oleh demikian, adalah tidak mungkin yang jualan itu satu penipuan untuk menutup belian fraud yang dikatakan ke atas tanah tersebut. Selanjutnya, oleh kerana plaintif telah gagal untuk membuktikan fraud di pihak defendan ketiga dalam jual beli Lot 451, kes terhadap defendan keempat juga akan gagal (lihat perenggan 24).]

#### Notes

For cases on fraud, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6445–6451.

For cases on misrepresentation, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6140–6144.

#### Cases referred to

*John Wallingford v The Directors of the Mutual Society* (1880) 5 AC 685, HL (refd)

*Malaysian French Bank Bhd v Abdullah bin Mohd Yusof & Ors* [1991] 2 MLJ 475, HC (refd)

*Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229, FC (refd)

#### Legislation referred to

Contracts Act 1950 s 18

Evidence Act 1950 s 101

Rules of the High Court 1980 O 18 r 12(2)

Sarawak Land Code (Cap 81) ss 132, 133, 134, s 134(2)

*Hasiera Hashim (Azmi & Co) for the plaintiff.*

*Lim Heng Choo (Lim & Lim Advocates) for the third defendant.*

*Lau Ung Key (Jaini, Robert, Lau & Rajjish Advocates) for the fourth defendant.*

#### Ravinthran JC:

#### THE INTRODUCTION

[1] In this action the plaintiff is claiming for the return of her land that was sold to the third defendant and subsequently to the fourth defendant. In the

- A alternative she is claiming for damages. The land was sold to the third defendant through a power of attorney that she had executed in favour of the first defendant. It is alleged that the first defendant and the second defendant had committed fraud by selling the land to the third defendant. The plaintiff had already entered judgment in default against the first and second defendants
- B and the instant trial proceeded against the third and fourth defendants only.

#### THE BRIEF FACTS OF THE PLAINTIFF'S CLAIM

- C [2] The plaintiff (Rokiah bt Suhaili) testified on her own behalf and called one other witness. Her evidence can be summarised as follows. She is a native of Sarawak. She was the owner of a parcel of land known as Lot 451, Block 17 Salak Land District which is classified as native area land. It is 8,134 sq m in size. The first defendant (Emily Batu ak Bagang) is also a native of Sarawak. She
- D traded under the style of Kai Hong Development Company. The plaintiff has alleged that the second defendant (Augustine Ling Chee Hua), who is a relative of Emily Batu, is the controlling mind of this firm. The plaintiff said that sometime before June 2001, Augustine Ling approached her and represented that Emily Batu could develop Lot 451. He assured her that he would be
- E personally involved in the development of Lot 451 into a commercial and residential area. He also told her that he was a competent and capable contractor. He asked for a power of attorney over her land. As consideration, the plaintiff was promised RM15,000 in cash plus a further consideration of
- F two units of single-storey semi-detached houses and one unit single storey terrace intermediate house. Based on the above representation from Augustine Ling, the plaintiff signed the development agreement with Emily Batu. The plaintiff could not remember when she signed the development agreement but it is dated 7 August 2009. At the same time, she signed an irrevocable power of attorney over Lot 451 in favour of Emily Batu. The plaintiff also signed an
- G agreement with one Shukriyah How bt Abdullah and a deed of revocation to revoke the power of attorney that had been granted to the latter. Shukriyah How bt Abdullah is also a beneficiary of the land. The execution of all the above documents was witnessed by an advocate Encik Osman Ibrahim ('PW2'). The plaintiff has only basic understanding of English and therefore did not
- H understand the contents. Encik Osman Ibrahim briefly explained to her the said documents. However, the project of Augustine Ling on Lot 451 did not take off. Augustine Ling then told the plaintiff that he was constructing residential units on a different parcel of land, ie Lot 9786. He told her that approval had already been obtained for the development of Lot 9786 and
- I convinced her to substitute the consideration stated in the development agreement with a detached house on Lot 9786. The plaintiff was then persuaded by Augustine Ling to sign the supplementary agreement. The supplementary agreement relieved Emily Batu of her obligations under the development agreement. However, the plaintiff never received any detached

house as promised in the supplementary agreement on Lot 9786. She sought legal advice and discovered that Augustine Ling had never received approval to develop Lot 9786 and had no legal or beneficial right over Lot 9786. The plaintiff also discovered that Augustine Ling sold her land to the third defendant (Serira Sdn Bhd) for RM730,000. Serira Sdn Bhd then resold the plaintiff's land to the fourth defendant (Rose ak Enteri) for the sum of RM800,000. Lot 451 was subsequently developed by SRK Resources Sdn Bhd. The plaintiff said that she never gave consent for the sale of Lot 451 to Serira Sdn Bhd. However, during cross-examination the plaintiff agreed that Encik Osman Ibrahim acted as her solicitor. She also agreed during cross-examination that after she revoked the development agreement, her 'interest' in Lot 451 was 'transferred' to Lot 9786.

[3] The only other witness for the plaintiff was Encik Osman Ibrahim. He is the solicitor who prepared the development agreement and the power of attorney in question. Encik Osman Ibrahim said that Emily Batu and Augustine Ling were his clients since 1997. They are related to each other. Augustine Ling introduced him to Rokiah. Encik Osman Ibrahim explained the contents of the development agreement and the power of attorney in Sarawak Malay to the plaintiff before she executed them. Encik Osman Ibrahim also explained to the plaintiff that it was necessary to revoke the power of attorney granted to Shukriyah who is the half share beneficial owner of Lot 451. He said that the development agreement and power of attorney was only for the purpose of development of Lot 451 into residential units and subsequent sale to end buyers. After the execution of the above documents, the 'normal answer' given to Encik Osman Ibrahim by Augustine Ling about the project on Lot 451 was that the authorities had not given approval. However, sometime in 2005, Augustine Ling instructed him to prepare a supplementary agreement to be executed between the plaintiff and Emily Batu. Augustine Ling told Encik Osman Ibrahim that the plaintiff was agreeable to sell Lot 451 to a willing buyer. Encik Osman Ibrahim then prepared a sale and purchase agreement for Lot 451 between the plaintiff and Serira Sdn Bhd. Encik Osman Ibrahim requested Augustine Ling to bring the plaintiff to him but was told to use the power of attorney that had been granted to Emily Batu to effect the sale. The sale and purchase agreement was sent to Mr Ting Tiew Hee ('DW1') of Loke, King Goh & Partners who acted for the buyer, Serira Sdn Bhd. Encik Osman Ibrahim said that the payment in cheques totalling RM730,000 for Lot 451 was sent to his office. The first cheque of RM73,000 was made payable to the plaintiff but cheques for the balance of the purchase price were made payable to the law firm of Encik Osman Ibrahim. The monies were collected by Augustine Ling. Encik Osman Ibrahim said that the monies were paid to Augustine Ling because Emily Batu had signed a letter of authorisation dated 1st November 2005 that confirmed Augustine Ling is her nominee. Encik Osman Ibrahim never checked with the owner of the land, ie the plaintiff, to inquire whether she received any of the monies because he was assured by

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- A Augustine Ling that 'all monies after appropriate deductions' would be given to her. He trusted Emily Batu and Augustine Ling because they were his clients since 1997. Encik Osman Ibrahim was only aware of irregularity in the transaction in early 2009 when the plaintiff came to inquire on the status of the development on Lot 451. During cross-examination, Encik Osman Ibrahim
- B agreed that by virtue of the supplementary agreement, the right of the plaintiff to receive consideration in the form of two units of single-storey semi-detached houses and one unit single storey terrace intermediate house in Lot 451 was 'transferred' to Lot 9786. In exchange, she was to receive a detached house on Lot 9786. He said that he explained the terms of the supplementary agreement
- C in English and Malay to her. He said that the plaintiff was aware of the contents of the supplementary agreement. In respect of the sale of Lot 451, Encik Osman Ibrahim agreed that he acted for the vendor, ie the plaintiff. However, he said that Augustine Ling assured him that it was the plaintiff who had instructed him to prepare the sale and purchase agreement.
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#### THE DEFENCE OF THE THIRD AND FOURTH DEFENDANTS

- E [4] The defence of Serira Sdn Bhd is that they acted in good faith in purchasing the property in question. They had no knowledge that the plaintiff did not consent to the sale. Serira Sdn Bhd called three witnesses. Rose ak Enteri did not call any witness. Her defence was that she bought Lot 451 in good faith from Serira Sdn Bhd.
- F [5] The first witness for Serira Sdn Bhd was Ting Tiew Hee ('DW1'). He is a former partner of the law firm of Loke, King Goh & Partners. He was instructed sometime in October 2005 to represent Serira Sdn Bhd in the sale and purchase transaction of Lot 451. The agreed purchase price was RM730,000. Mr Ting commissioned a valuation on the land for the purpose of
- G a loan application. Serira Sdn Bhd used an overdraft facility of RM400,000 to finance the purchase. The estimated market value according to the valuers, CH Williams, Talhar, Wong & Yeo, was RM732,000. He said that he had no reason to doubt that the land owner, the plaintiff, had authorised the sale. This is because Encik Osman Ibrahim represented the plaintiff. Furthermore, the
- H power of attorney executed by the plaintiff was drafted by Encik Osman Ibrahim. Mr Ting said that Serira Sdn Bhd paid RM730,000 to the plaintiff through Encik Osman Ibrahim who acted as stakeholder. The first cheque in the sum of RM73,000 to cover the deposit was made payable to the plaintiff in her own name on an 'account payee only' basis and handed over to Encik
- I Osman Ibrahim. Mr Ting said that from Serira Sdn Bhd's banking records, he discovered that the cheque was cashed through the plaintiff's account at the AmBank branch in Jalan Satok. The account number was 011-202-200051-5. Mr Ting was therefore satisfied that Rokiah had received the deposit of RM73,000. For that reason, the balance of the purchase price in two

Bumiputera Commerce Bank cheques of RM184,000 and RM400,000 was made payable to the law firm of Encik Osman Ibrahim. The memorandum of transfer for the land was prepared by Encik Osman Ibrahim who also submitted it to the Lands and Surveys Department. During cross-examination, Mr Ting said that he was instructed by Serira Sdn Bhd to deal directly with Encik Osman Ibrahim who acted for the vendor. Encik Osman Ibrahim told him that he was acting for the registered proprietor. Mr Ting said that because of the assurance of Encik Osman Ibrahim, he did not read the power of attorney executed by the plaintiff. Instead he relied on Recital 3 of the Sale and Purchase Agreement that was drafted by Encik Osman Ibrahim which stated that Emily Batu was empowered to deal with the land and enter into an agreement with a purchaser. He disagreed that Emily Batu had conspired with Serira Sdn Bhd to go behind the back of the plaintiff in the sale transaction. Mr Ting agreed that he again acted for Serira Sdn Bhd in the subsequent sale of Lot 451 to Rose ak Enteri. However, he disagreed that the sale to Rose ak Enteri is a device to conceal the alleged fraud perpetrated by Serira Sdn Bhd and Augustine Ling on the plaintiff. Mr Ting only agreed that at one point he was a director of Sendayan Resources Sdn Bhd which is an associate company of Serira Sdn Bhd.

[6] The second witness for Serira Sdn Bhd was Yii Ching ('DW2'). He is one of the two directors of Sendayan Resources Sdn Bhd which is an associate company of Serira Sdn Bhd. The cheque in the sum of RM73,000 to cover the deposit for the sale was issued by Sendayan Resources Sdn Bhd. Yii Ching is also an authorised signatory for the cheques of Sendayan Resources Sdn Bhd. He said that the Bumiputera Commerce Bank cheque that was issued to the plaintiff was reflected in his company's bank statement. He was challenged during cross-examination that he did not issue the said cheque but he disagreed.

[7] The third and last witness for the third defendant was Marcus Lee. He is the manager at the AmBank branch in Jalan Satok. He said that the Bumiputera Commerce Bank cheque in the sum of RM73,000 was deposited into account number 011-202-200051-5 and the holder of the account was Rokiah bt Suhaili. However, during cross-examination, he agreed that he did not work in the bank at the material time the account was opened. Thus he has no personal knowledge whether the plaintiff came to the bank to open the account.

#### THE CASE AGAINST THE FIRST AND SECOND DEFENDANTS

[8] The plaintiff has pleaded fraud and misrepresentation against Emily Batu and Augustine Ling. The particulars of fraud and misrepresentation are that Augustine Ling had misled her to believe that the development plan for Lot

- A 451 had been approved and that the plaintiff would be given cash of RM15,000 plus a further consideration of two units of single-storey semi-detached houses and one unit single-storey terrace intermediate house for the said land. This is the consideration stated in the development agreement. Furthermore, when the development agreement was revoked by the
- B supplementary agreement, Augustine Ling misrepresented to her that she would be getting a detached house on Lot 9786 in exchange for the consideration of RM15,000 plus a further consideration of two units of single-storey semi-detached houses and one unit single-storey terrace intermediate house on Lot 451. The plaintiff only found out later that Emily
- C Batu and Augustine Ling had no interest in the residential development project on Lot 9786 and they were in no position to secure her a detached house on Lot 9786. Thus they had fraudulently misrepresented to the plaintiff that she would be given a detached house on Lot 9786 as consideration for releasing Emily Batu from her obligations under the development agreement. Emily
- D Batu and Augustine Ling did not defend this action and the plaintiff has entered judgment in default against them. During the trial, the plaintiff testified unchallenged against Emily Batu and Augustine Ling in respect of the fraudulent misrepresentation that I adverted to earlier. The supplementary agreement clearly states that the plaintiff is entitled to a detached house on Lot
- E 9786. However, indisputable evidence was led in court that neither Emily Batu nor Augustine Ling were in any position to make such a promise in the supplementary agreement as the developer of the project on Lot 9786 was a different entity, ie SRK Resources Sdn Bhd. In the premises, the plaintiff has proved fraudulent misrepresentation against Emily Batu and Augustine Ling.
- F However, as judgment in default had already been entered against them, the crucial question in this case is whether the plaintiff had proved fraud or fraudulent misrepresentation against Serira Sdn Bhd and Rose ak Enteri (the third and fourth defendants).

G THE ISSUES

*Failure to plead particulars against the third and fourth defendants*

- H [9] The plaintiff only pleaded particulars of fraud and misrepresentation in paras 6 and 8 of the statement of claim. However, no particulars in the above paragraphs are directed against Serira Sdn Bhd and Rose ak Enteri, the third and fourth defendants herein. The cause of action in fraud and misrepresentation against Serira Sdn Bhd and Rose ak Enteri is framed in
- I paras 11–13 of the statement of claim. The said paragraphs read as follows:

11. Further and/or alternatively, the 3rd Defendant and the 4th Defendant knew or would have reasonably known or ought to have known that the 1st Defendant is granted with the Power of Attorney by the Plaintiff for the sole of purpose of the said Development Agreement which is and/or was at all material time to develop the said

Lot 451 into dwelling houses by the first defendant as agreed in the said Development Agreement and any right to sell is only in relation to the said developed dwelling houses and not the vacant land per se.

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12. The sales of the said Lot 451 from 1st Defendant to the 3rd Defendant and from the 3rd defendant to the 4th defendant are tainted by fraud and/or misrepresentation as aforesaid thus null and void.

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13. Further and/or alternative, the 3rd Defendant and 4th Defendant has obtained the said Lot 451 from the 1st Defendant by fraud and/or misrepresentation as aforesaid. Thus the transfers of the title of the said Lot 451 to the third defendant and subsequently to the fourth defendant are null and void, Further and/or alternatively, the 3rd and 4th defendants are not bona fide purchasers.

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[10] Counsel for Serira Sdn Bhd submitted that the plaintiff failed to provide particulars of fraud and misrepresentation as required by the rules of pleadings. In support he cited a passage from *Bullen Leake and Jacob's Precedents of Pleadings* which in part reads as follows:

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Full Particulars of any misrepresentation relied on must be given in the pleading ... Any charge of fraud or misrepresentation must be pleaded with the utmost particularity (*Garden Neptune v Occidental*, above). The statement of claim must show the nature and extent of each alleged misrepresentation (*Newport Dry Dock & Engineering Co v Paynter* (1886) 34 Ch D 88) and contain particulars showing by whom and to whom it was made, and whether orally or in writing, and if in writing, identifying the relevant document (*Seligmann v Young* [1884] WN 93).

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[11] Counsel for the plaintiff did not address this point in her submission. I find that there is merit in the argument of the counsel for Serira Sdn Bhd. Order 18 r 12(2) provides that particulars of fraud or misrepresentation must be given in the pleading. In my view, the three paragraphs directed against the third and fourth defendant are general averments only which are singularly lacking in particulars. The rationale for particulars where fraud is alleged was given in the case of *John Wallingford v The Directors of the Mutual Society* (1880) 5 AC 685 (folld) where Lord Blackburn said as follows in this passage (cited with approval by Zakaria Yatim J in *Malaysian French Bank Bhd v Abdullah bin Mohd Yusof & Ors* [1991] 2 MLJ 475):

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I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, 'I say I owe the man nothing'. Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned.

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A [12] The above passage also found its way into *Mallal's Supreme Court Practice*, where it is stated (at pp 204–205 of the 4th Ed) that:

B Particulars of fraud must be pleaded. A general allegation of fraud, however strong the words used, where there is no statement of circumstances relied on as constituting the alleged fraud, is insufficient even to amount to an averment of fraud of which any court ought to take notice: *John Wallingford v The Directors & C of the Mutual Society and the Official Liquidator thereof* (1879-80) 5 App Cas 685 at pp 697, 701 and 709.

C [13] In para 11, the plaintiff has made an allegation that Serira Sdn Bhd and Rose ak Enteri would have known that the purpose of the power of attorney granted to Emily Batu was for the development of the land into residential and commercial units. In paras 12–13, the plaintiff has only made a very general allegation that the sale of the land to Serira Sdn Bhd was tainted by fraud. No  
D particulars in respect of the involvement of Serira Sdn Bhd and Rose ak Enteri in the fraudulent misrepresentation made by Emily Batu and Augustine Ling to the plaintiff were given. On this ground alone, my view is that the claim against Serira Sdn Bhd and Rose ak Enteri should be dismissed. However,  
E assuming I am wrong in this holding and that paras 11–13 of the statement of claim are sufficient to give notice of the alleged fraud or fraudulent misrepresentation committed by Serira Sdn Bhd and Rose ak Enteri, I shall now proceed to consider the evidence tendered during trial.

#### THE MISREPRESENTATION

F [14] I shall firstly consider the plea of misrepresentation. Section 18 of the Contracts Act 1950 defines misrepresentation as follows:

18 'Misrepresentation'.

G 'Misrepresentation' includes -

- H (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
- I (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[15] Only two witnesses testified for the plaintiff, ie the plaintiff herself and Encik Osman Ibrahim. Neither of them said that Serira Sdn Bhd or Rose ak

Enteri had made any representation that pertains to paras 11–13 of the statement of claim. The fraud committed by Emily Batu and Augustine Ling was that that they were not in a position to fulfill the promise made in the supplementary agreement that a detached house in the residential project on Lot 9786 would be given to the plaintiff in exchange for the original consideration of RM15,000 in cash plus a further consideration of two units of single-storey semi-detached houses and one unit single storey terrace intermediate house on Lot 451. The other fraudulent act is that Emily Batu and Augustine Ling had sold Lot 451 when the power of attorney only empowered Emily Batu to sell developed subdivided lots. The plaintiff did not say that she met any official of Serira Sdn Bhd. She also did not meet Mr Ting who is the solicitor who acted for Serira Sdn Bhd. Mr Ting testified without being contradicted that he never met the plaintiff until he came to court. Encik Osman Ibrahim, the solicitor who acted for the plaintiff, did not say in his evidence that Mr Ting made any representation to him pertaining to the fraudulent misrepresentation committed by Emily Batu and Augustine Ling. In the premises, there is no evidence at all that Serira Sdn Bhd had made any representation to the plaintiff or had misled her through Mr Ting or any other person. The only evidence relating to misrepresentation given by the plaintiff is as follows. An unknown and unidentified person had apparently approached the plaintiff on behalf of Serira Sdn Bhd to seek her permission to dump excess earth on her land. However, no further evidence was tendered in respect of this allegation and it is not clear how this encounter with the unidentified person supports allegation of misrepresentation against Serira Sdn Bhd and Rose ak Enteri.

#### THE BURDEN OF PROOF

[16] The case of the plaintiff against Serira Sdn Bhd and Rose ak Enteri is that the power of attorney did not empower Emily Batu to sell Lot 451 and that the use of it amounted to fraud. The first question that should be addressed is who bears the burden of proving that the land was sold fraudulently. I have already held that Emily Batu and Augustine Ling had made a fraudulent misrepresentation in the supplementary agreement. The misrepresentation pertains to their failure to deliver a detached house as promised in the supplementary agreement. I also held that Augustine Ling knew that he could not perform the promise because he had no interest in the project on Lot 9786. However, the question whether the sale of the Lot 451 to Serira Sdn Bhd was tainted by fraud is a separate issue. Counsel for plaintiff has submitted that Serira Sdn Bhd and Rose ak Enteri bore the burden to prove that the sale transaction was above board. Counsel for Serira Sdn Bhd submitted otherwise. In my view, counsel for Serira Sdn Bhd is correct. Section 101 of the Evidence Act 1950 enacts that whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must

- A prove that those facts exist. Furthermore, ss 132-134 of the Sarawak Land Code provide that the title of the registered owner is protected unless it is vitiated by fraud. Even then, the registered owner's interest is protected if he can prove that he purchased the land in good faith and for value (see s 134(2) of the Sarawak Land Code). However, the first issue is whether the sale transaction is
- B tainted by fraud. The burden of proving fraud lies on the plaintiff and the standard of proof for fraud is the criminal standard, ie proof beyond reasonable doubt (see the Federal Court case of *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229).

C WHETHER FRAUD PROVEN?

- [17] Counsel for the plaintiff submitted that the power of attorney granted to Emily Batu did not empower her to sell the land to Serira Sdn Bhd. This
- D submission is central to the allegation of the plaintiff that Serira Sdn Bhd had committed fraud. It was put to Mr Ting that, as a prudent solicitor, he would have read the power of attorney. Mr Ting told the court that he was an experienced conveyancing lawyer. Mr Ting said that he did not read the agreement because Recital No 3 to the sale and purchase agreement prepared
- E by Encik Osman Ibrahim stated that Emily Batu is empowered to sell the land. The argument of counsel for the plaintiff is that if the power of attorney is read as a whole and read together with the development agreement, the only conclusion that can be drawn is that Emily Batu is not entitled to sell the land as a whole but only entitled to sell subdivided lots to buyers after the
- F development project is completed. It follows that since Emily Batu sold the undivided and undeveloped land using the power of attorney, it was an act of fraud which cannot confer the title of Lot 451 to Serira Sdn Bhd. In my opinion, a reading of the power of attorney and the evidence that unfolded in this case does not support that conclusion. My reasons are as follows.

- G [18] It is true that the power of attorney read together with the development agreement, supports the argument of the plaintiff that the parties had originally intended to develop Lot 451. However, for reasons that will be given later, it does not mean that Emily Batu was not empowered to sell Lot 451. The
- H development agreement is essentially a joint venture agreement between the plaintiff and Emily Batu. However, at a later stage, the plaintiff voluntarily executed the supplementary agreement. The plaintiff's own witness and former solicitor, Encik Osman Ibrahim, testified that he had prepared the supplementary agreement and had explained its contents to her. In the
- I supplementary agreement, the plaintiff and Emily Batu effectively revoked the development agreement. The consideration of RM15,000 in cash plus a further consideration of two units of single-storey semi-detached houses and one unit single storey terrace intermediate house on Lot 451 meant for the plaintiff was substituted with a detached house on Lot 9786. In Recital 6 of the

supplementary agreement, it is stated that the plaintiff is desirous of selling Lot 451 to Emily Batu. Recital 6 of the supplementary agreement reads as follows:

The vendor is desirous of selling and the purchaser agrees to buy the said land free from encumbrances subject to the terms and conditions stipulations and in the manner hereinafter provided.

[19] In the supplementary agreement, the plaintiff is described as the vendor and Emily Batu is described as the purchaser. This clause contradicts the argument of the plaintiff that she never intended to sell Lot 451. Clause 7 of the power of attorney clearly enables the donee to sign any sale and purchase agreement or memorandum of transfer in respect of Lot 451. Furthermore cl 7 of the power of attorney reads as follows:

7 To sell and transfer including to sign seal execute and deliver the sale and purchase agreement, memorandum of transfer, and such other relevant instruments pertaining to the Said Land to any natural or corporate person as the Attorney deems fit.

[20] It must also be noted that the power of attorney to Emily Batu by the plaintiff was termed as 'irrevocable'. This power of attorney was not revoked by the plaintiff at the time the supplementary agreement was executed. Anyway, as it is an irrevocable power of attorney, the consent of the donee would have been necessary before any revocation becomes effective. The plaintiff agreed during cross-examination that even at the outset, the power of attorney had come into existence one month before the development agreement. The plaintiff also agreed during cross-examination that she did not revoke the power of attorney and let it stand. In my opinion, all this means that the power of attorney was valid at the time of the sale of Lot 451 to the third defendant. Furthermore, cl 7 of the power of attorney is wide in its application. It does not provide that the donee can only sell developed subdivided lots. In the premises, it is clear that Emily Batu was empowered by the terms of the power of attorney to sell Lot 451 to Serira Sdn Bhd.

WHETHER THE THIRD AND FOURTH DEFENDANTS ARE BONA FIDE PURCHASERS?

[21] Counsel for the plaintiff's argument is that Serira Sdn Bhd and Rose ak Enteri are not bona fide purchasers. However, the evidence on this point, at best, is conjectural and at worst, speculative. This is not sufficient proof as the beyond reasonable doubt is required to prove fraud. Counsel for plaintiff submitted that Mr Ting, as the solicitor for Serira Sdn Bhd, would have read the power of attorney and would have known that the land cannot be sold except as developed sublots. Mr Ting testified under rigorous

A cross-examination that he did not read the power of attorney. In my view, this explanation is plausible because Recital 3 of the sale and purchase agreement states that Emly Batu is empowered to sell the said land. It says as follows:

B The Vendor has executed a Power of Attorney in favour of Emly Batu Ak Bagang (WN KP 501203-13-5024) (Bidayuh) trading under the name and style of KAI HONG DEVELOPMENT, a firm registered under the Business Names Ordinance No 23958 having its place of business at No 197, Jalan Nanas Barat, Kuching, Sarawak, registered as Instrument No L 24564/2001 and under the said Power of Attorney the said EMLY BATU AK BAGANG is empowered to deal with 'the said Land' and to enter into this Agreement with the Purchaser.

C [22] This agreement was drafted by Encik Osman Ibrahim himself who acted not only for Emly Batu and Augustine Ling but for the plaintiff as well. Counsel for the plaintiff argued that Encik Osman Ibrahim only acted for the Emly Batu and Augustine Ling. However, this submission is not supported by the testimony of the plaintiff herself. She said consistently during cross-examination that Encik Osman Ibrahim was also acting for her. In the premises, Mr Ting was perfectly entitled to rely on the representation in the Recital 3 of sale and purchase agreement, which was drafted by Encik Osman Ibrahim, that Emly Batu was empowered to sell the land on behalf of the plaintiff. In any event, as I have said earlier, cl 7 of the power of attorney is wide enough to empower the Emly Batu to sell Lot 451. It permits the sale and transfer of the said land to any natural or corporate person as the attorney thinks fit without any condition.

F THE FAILURE TO REMIT PAYMENT TO THE PLAINTIFF

G [23] The plaintiff told the court that she never received the deposit of RM73,000. It must be recalled that Mr Ting said that the first cheque of RM73,000 was made payable in her name and that he was satisfied that it was banked into an account bearing her name at the AmBank branch in Jalan Satok. The plaintiff also said that she did not receive the balance of the purchase price that was paid via cheques made payable to the law firm of Encik Osman Ibrahim. Serira Sdn Bhd called the bank manager at the AmBank branch in H Jalan Satok as a witness. The bank manager, Mr Marcus Lim, testified that account number 011-202-200051-5 belonged to one Rokiah bt Suhaili which is the name of the plaintiff. The plaintiff denied that the account belonged to her. As for the balance of the monies, Mr Ting told the court that it was paid via cheques made payable to the law firm of Encik Osman Ibrahim who acted for I the plaintiff. Encik Osman Ibrahim confirmed that he received the said cheques but he permitted Augustine Ling to collect the monies. The reason is that Encik Osman Ibrahim believed that the monies would be paid to the plaintiff after 'appropriate deduction'. It is of fundamental importance to note that the plaintiff agreed numerous times that Encik Osman Ibrahim acted as

her solicitor. From a reading of the witness statement of Encik Osman Ibrahim, it is apparent that he was intimately involved in the sale and purchase transaction. He drafted the sale and purchase agreement. He communicated with Mr Ting who acted for Serira Sdn Bhd. He collected the payment of RM730,000. He also acted for Emily Batu and Augustine Ling. Mr Ting never acted for the plaintiff nor made any representation to her. In the premises, Mr Ting or Serira Sdn Bhd cannot be blamed if the deposit of RM73,000 and the balance of the purchase price of RM730,000 did not reach the plaintiff.

#### THE CLAIM AGAINST THE FOURTH DEFENDANT

[24] The plaintiff's case is that Rose ak Enteri had purchased the land to cover up the fraud committed by Serira Sdn Bhd. However, no evidence whatever against Rose ak Enteri either for fraud, misrepresentation or conspiracy were tendered in court. In fact Serira Sdn Bhd sold the land to Rose ak Enteri only after some time, ie about two and a half years after purchasing it. Therefore, it is unlikely that the sale was a sham to cover up the alleged fraudulent purchase of the land. Since, for reasons given earlier, I found that the plaintiff failed to prove fraud on the part of Serira Sdn Bhd in the sale and purchase of Lot 451, it follows that the case against the fourth defendant fails as well.

#### THE SUMMARY AND CONCLUSION

[25] The case of the plaintiff against the defendants was for fraud and fraudulent misrepresentation. However, there is evidence of fraudulent misrepresentation on the part of Emily Batu and Augustine Ling only. The power of attorney empowered Emily Batu to sell the land without any limitation and therefore Serira Sdn Bhd was entitled to rely on it to buy the land. Furthermore, Encik Osman Ibrahim who is also acknowledged as the solicitor of the plaintiff drafted the sale and purchase agreement and received the purchase price. For that reason, the plaintiff cannot disavow any knowledge of the transaction. For the same reason, she cannot blame Serira Sdn Bhd for not receiving the purchase price. For all the foregoing reasons, I shall dismiss the claim of the plaintiff against the third and fourth defendants. The plaintiff shall pay costs of RM15,000 to the third defendant and costs of RM7,000 to the fourth defendant.

*Plaintiff's claim dismissed with costs of RM15,000 to the third defendant and RM7,000 to the fourth defendant.*

Reported by Ashgar Ali Ali Mohamed